STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 6, 2011
v	No. 294042 Jackson Circuit Court
JEFFERY RICHARD JONES, Defendant-Appellant.	LC No. 08-005775-FH

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

TALBOT, J. (*concurring).*

While I am compelled to concur in the majority opinion based on the wording and interpretation of MCL 333.7403 as discussed in *People v Green*, 196 Mich App 593; 493 NW2d 478 (1992), I write separately to voice my concerns regarding the *Green* decision and its application.

Jeffery Jones contests his conviction pursuant to MCL 333.7403(2)(a)(*iii*) for the possession of methadone (39.44 grams) and oxycodone (31.49 grams total), which were combined or aggregated to meet the "50 grams or more" weight requirement of the statutory subsection. Jones argues that any convictions for possession of the above drugs should have been separate and not combined, necessitating his resentencing.

The relevant statutes involved are MCL 333.7403 and MCL 333.7214 and their interplay. MCL 333.7403, provides, in pertinent part:

> (1) A person shall not knowingly or intentionally possess *a controlled substance*, a controlled substance analogue, or a prescription form unless the controlled substance, controlled substance analogue, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.
>
> (2) A person who violates this section as to:
>
> (a) *A controlled substance classified in schedule 1 or 2 that is a narcotic drug* or a drug described in section 7214(a)(*iv*), and:

* * *

(*iii*) Which is in an amount of 50 grams or more, but less than 450 grams, *of any mixture containing that substance* is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $250,000.00, or both. [Emphasis added.]

In turn, MCL 333.7214 provides a listing of schedule 2 controlled substances as including:

(a) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(*i*) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate excluding nalaxone and its salts, and excluding naltrexone and its salts, but including the following:

* * *

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, when the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation . . . .

The drugs involved in Jones' conviction are both opiate-based and listed in MCL 333.7214. Specifically, oxycodone is included in MCL 333.7214(a)(*i*) and methadone is listed under MCL 333.7214(b)(*i*).

In *Green*, the "dispositive question" was "whether the Legislature intended that two convictions might result under § 7403(2)(a)(v) for the simultaneous possession of two prohibited substances." *Green*, 196 Mich App at 595. The defendant in *Green* was challenging his two counts of a possession of a controlled substance that arose out of a "single act" involving trace amounts of heroin and cocaine as violating double jeopardy. The *Green* Court, focusing on the singularity of the statutory wording, interpreted the language of MCL 333.7403, stating:

[T]he Legislature intended the imposition of criminal liability to turn on the consideration of two separate factors. The first factor is the amount of a controlled substance possessed . . . . The second factor is the type of controlled substance possessed . . . . The present statutory provisions consistently refer to the contraband in a singular form: "a controlled substance, "the controlled substance," "a narcotic drug," "that controlled substance." Additionally, the Legislature's use of the phrase "any mixture containing that controlled substance" suggests to us that the Legislature intended that punishment be imposed on the basis of the amount of a specific controlled substance possessed, with the implication being that possession of different types of controlled substances warrants punishment for each particular controlled substance possessed. [*Green*, 196 Mich App at 595-596.]

My concern is with the restrictive manner in which this statutory language has been interpreted.

In drafting this statutory scheme, the Legislature was clearly seeking to address concerns regarding the possession of narcotics and illegal substances by imposing criminal liability for possession or intent to deliver. Based on the graduated penalties imposed, the amount of drugs in a defendant's possession is a significant factor to be considered.[1] The other concern is the "type" of controlled substance possessed. While *Green* appears to indicate that possession of different or multiple drugs should warrant independent convictions and punishments, I do not believe that is necessarily the correct interpretation, or the intent, of the statute.

Green references "the type of controlled substance possessed." Contrary to use of the term "type" in *Green*, the "type" of drug possessed does not necessarily reference a specific variety of the drug, but merely the classification or inherent characteristics of the controlled substance. This is consistent with the definition of the term "type," which means "a class, group, or category of things . . . sharing one or more characteristics; a thing . . . regarded as a member of a class or category; kind; sort." *Random House Webster's College* Dictionary (1997). In this case, both the oxycodene and methadone are each deemed to be a Class 2 controlled substance. They are opiates or opiate-derivatives, thereby making them the same "type" of controlled substance. This is also consistent with the definitions of the terms "substance" as "[t]he essence of something; the essential quality of something, as opposed to its mere form" and "controlled substance" as encompassing "[a]ny type of drug whose possession and use is regulated by law . . . ." Black's Law Dictionary (9th ed).

I would find the language of MCL 333.7403 to be less restrictive than that suggested by *Green*, and would understand that the statutory reference to "[a] controlled substance classified in schedule 1 or 2," MCL 333.7403(2)(a), and "any mixture containing that substance," MCL 333.7403(2(a)(*iii*), to not singularly reference a specific pill designation, but rather the broader classification or type of drug involved.[2] A broader reading of this statutory language would also serve to follow the reasoning in other case law regarding the aggregation of drugs for weight. For instance, aggregation is not precluded "if two mixtures are possessed or delivered and *both* contain a controlled substance." Gillespie, Michigan Criminal Law and Procedure (2010), § 5:103, citing *People v Velasquez*, 125 Mich App 1; 335 NW2d 705 (1983). Specifically, in

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[1] It is well recognized that "[i]ntent to deliver can be inferred from the quantity of the controlled substance in the defendant's possession and from the way in which the controlled substance is packaged." *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

[2] I believe that another distinction exists regarding the applicability of *Green*, based on the actual holding in that case. The *Green* Court stated, "[W]e hold that the *statute permits multiple charges and convictions under the circumstances of this case*." *Green*, 196 Mich App at 596 (emphasis added). Notably, the Court did not mandate separate convictions, it merely determined that bringing the charges separately did not violate double jeopardy.

cases involving the use of "fillers" or "additives" mixed in with an illegal substance this Court has found:

> In *People v Prediger*, 110 Mich App 757, 760; 313 NW2d 103 (1981), we held that the weight classifications found in MCL 333.7401(2)(a); M.S.A. § 14.15(7401)(2)(a) "refer to the aggregate weight of a mixture containing a controlled substance and not solely to the weight of a pure controlled substance". Furthermore, this Court upheld these statutory weight classifications against an equal protection challenge in *People v Lemble*, 103 Mich App 220, 222; 303 NW2d 191 (1981), wherein we held that punishing defendants more severely for possessing greater amounts of "any mixture" containing a controlled substance was reasonable as the greater the quantity of mixture, whatever the degree of purity, the greater the potential for distribution and harm to society. See also *People v Campbell*, 115 Mich App 369; 320 NW2d 381 (1982). [*People v Puertas*, 122 Mich App 626, 629-630; 332 NW2d 399 (1983).]

If, under certain conditions, the weight of a controlled substance can be aggregated to include the weight of a non-controlled or legal substance, such as baking soda that is mixed in with the controlled substance, it does not seem unreasonable to include or aggregate specific drugs within the same classification or type of a controlled substance. Such a common-sense approach would better serve to effectuate the statutory intent or purpose to impose greater punishment based on the amount of drugs possessed.

To interpret MCL 333.7403 as mandating separate convictions for each individual drug possessed could lead to absurd results in certain factual circumstances and permit a defendant to avoid the intended consequences of possession or delivery of a specific type of controlled substance in significant amounts.

/s/ Michael J. Talbot